No. 21008

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY MOON,

Appellant

v.

ORVILLE FREEMAN, as Secretary of Agriculture, and COMMODITY CREDIT CORPORATION,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF THE APPELLEES

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JURISDICTION

Jurisdiction in this Court is based upon 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

Appellee believes that a more complete statement of the wheat program, as authorized by Congress, may be helpful to the Court in resolving the issue before it - hence this counterstatement.

The genesis of the Wheat Marketing Allocation Program is in §§ 324 and 325 of the Food and Agriculture Act of 1962 (76 Stat. 605, 626-631), which amends, in certain respects, the Agricultural Adjustment Act of 1938, as amended (7 U. S. C. s 1281 et seq.), and the Agricultural Act of 1949, as amended (7 U. S. C. § 1421 et seq.). The legislative finding was made, in this enactment in

1962, that:

> "Wheat, in addition to being a basic food, is one of the great export crops of American agriculture and its production for domestic consumption and for export is necessary to the maintenance of a sound national economy and to the general welfare. The movement of wheat from producer to consumer, in the form of the commodity or any of the products thereof, is preponderantly in interstate and foreign commerce. Unreasonably low prices of wheat to producers impair their purchasing power for nonagricultural products and place them in a position of serious disparity with other industrial groups. The conditions affecting the production of wheat are such that without Federal assistance, producers cannot effectively prevent disastrously low prices for wheat. It is necessary, in order to assist wheat producers in obtaining fair prices, to regulate the price of wheat used for domestic food and for exports in the manner provided in this subtitle [i.e., §§ 1379a-1379j of Title 7, U. S. C.]."

The Wheat Marketing Allocation Program - as provided for in 1962 - was a part of a regulatory plan for mandatory acreage allotments and marketing quotas. 7 U. S. C. 1958 ed. (Supp. IV) § 1281 et seq. The statute required a referendum among wheat farmers to determine whether at least two-thirds of those voting in the referendum favored the imposition of quotas. 7 U. S. C. 1958 ed. (Supp. IV) § 1336. The Secretary determined, on the basis of the referendum, that "[s]ince more than one-third of those voting opposed quotas, wheat marketing quotas will not be in effect for the 1964-65 marketing year." 28 F.R. 6039.

Further statutory amendments were recommended by the President "to check a drastic decline in producer income from the 1964 crop."

110 Cong. Rec. 1462. It was estimated that in the absence of additional legislation wheat producers would receive "between $500 million and $700 million less in 1964 than they did in 1963." A "certificate program on a voluntary basis" was recommended. "The law," said the President, "should be designed to, first, raise the income of wheat growers substantially above what it would be in the absence of new legislation; second, avoid increases in budgetary costs; third, maintain the price of wheat at a level which will not increase the price of bread to the consumer, and fourth, enable the United States to discharge its responsibilities and realize the benefits of the International Wheat Agreement." Ibid.

Thereupon the Congress enacted the Agricultural Act of 1964 (78 Stat. 173, 178-183) further amending the Agricultural Adjustment Act of 1938, as amended, and the Agricultural Act of 1949, as amended. A "wheat marketing allocation program as provided in this subtitle [i.e., §§ 1379a-1379j of Title 7, U. S. C.] shall be in effect for the marketing years for the 1964 and 1965 crops." 78 Stat. at 179, 7 U. S. C. § 1379b.

The Wheat Allocation Program provided for production controls on a voluntary basis; and to encourage producers to participate in the program those agreeing to follow the quota system were entitled to receive marketing certificates valued at the rate of 70 cents per bushel for a portion of the crop which it was estimated would

be used for food consumption in the United States, and 25 cents per bushel for a certain portion of the crop which it was estimated would be exported. To finance this program the processors were required to buy certificates at the rate of 70 cents per bushel for all wheat processed into food, and 25 cents per bushel for all wheat to be exported. However whereas payments to producers were based on normal production for the acreage allotments the payments by processors and exporters were based on the number of bushels of wheat actually processed for food consumption or actuall purchased for export.[1/] (7 U. S. C. 1379b,c,d(b)). If the Department's estimates proved substantially correct and if most American farmers participated in the program the payments to producers would be financed by receipts from the processors.

There is one significant factor which cannot be overstressed - the tentative nature of the exporter's payments. He had to buy the certificates at the 25 cent rate, but to make certain that this payment would not increase the price of American wheat above the world price, thus depriving American farmers of an international market Congress provided:

1/ Exporters engaged in the sale of wheat abroad pay 25 cents for each bushel of wheat exported. There is no provision for the purchase of export certificates in connection with the sale abroad of flour. However, the processor must buy 70 cent certificates on all wheat processed into flour used for food, regardless of its ultimate destination. This cost is passed on to the exporter, who, is entitled to a refund from Commodity Credit Corporation to the extent necessary to make his flour competitive in the world market. (7 U. S. C. 1379d(b))

> In order to expand international trade in wheat and wheat flour and promote equitable and stable prices therefor the Commodity Credit Corporation shall, upon the exportation from the United States of any wheat or wheat flour, make a refund to the exporter or allow him a credit against the amount payable by him for marketing certificates, in such amount as the Secretary determines will make United States wheat and wheat flour generally competitive in the world market, avoid disruption of world market prices, and fulfill the international obligations of the United States. (1379d(b).

As a consequence of this section the actual payments made by an exporter fluctuated from day to day with the world price. As noted in the affidavit of Mr. Godfrey, Administrator of Agricultural Stabilization and Conservation Service, the exporters may have had to pay nothing - indeed they were frequently the recipients of an actual cash subsidy - if such were necessary to make American wheat competitive in the world markets. (R. 49)

In the case at bar the appellant is an exporter who paid $411.93 for certificates in the marketing year 1964-1965. He received a statutory refund of $243.41 to bring his wheat in line with the world price, and sues to recover the difference - $168.52, contending that the statute authorizing the Secretary to require processors to purchase certificates for wheat to be exported is in violation of Art. 1, Sec. 9, clause 5 of the Constitution.

Decision of the District Court

Both parties, after agreeing upon a stipulation of fact, filed motions for summary judgment. In view of the attack upon the constitutionality of a statute a three-judge court was convened and heard argument on the motions for summary judgment. It then ruled

that since the only relief available to the plaintiff was a money judgment, the matter did not require the attention of a three-judge court, and the matter was remanded to the District Court for decision. (245 F. Supp. 837, 838-839, E.D. Wash.). The District Court (Judge Powell was a member of the three-judge panel) granted the Government's motion for summary judgment.

Constitutional Provisions, Statutes and Regulations Involved

Constitutional Provisions:

Art. 1, Sec. 9, Clause 5 - No tax or duty shall be laid on articles exported from any State.

Art. 1, Sec. 8, Clause 3 - Congress shall have the power "To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

Statutory Provisions Involved:

The complete text of the statutory provisions involved will be found at 7 U.S.C. 1379(a) to (j), 76 Stat. 626-629, as amended, 78 Stat. 180-181.

The particular provisions being challenged are:

Marketing Certificates:

The Secretary shall, in accordance with such regulation as he may prescribe, provide for the issuance of domestic marketing certificates for the portion of the wheat marketing allocation representing wheat used for food products for consumption in the United States and for the issuance of export marketing certificates for the portion of the wheat marketing allocation used for exports. 78 Stat. at 180, 7 U.S.C. § 1379(a).

Marketing Restrictions:

(i) all persons engaged in the processing of wheat into food products shall, prior to marketing any such food product or removing such food product

for sale or consumption, acquire domestic marketing certificates equivalent to the number of bushels of wheat contained in such product and (ii) all persons exporting wheat shall, prior to such export, acquire export marketing certificates equivalent to the number of bushels so exported. In order to expand international trade in wheat and wheat flour and promote equitable and stable prices therefor the Commodity Credit Corporation shall, upon the exportation from the United States of any wheat or wheat flour, make a refund to the exporter or allow him a credit against the amount payable by him for marketing certificates, in such amount as the Secretary determines will make United States wheat and wheat flour generally competitive in the world market, avoid disruption of world market prices, and fulfill the international obligations of the United States." 78 Stat. at 181, 7 U. S. C. § 1379d(b).

The regulations involved herein are:

> 7 CFR Par. 778.5(a) which requires exporters to "acquire and surrender certificates to CCC... for wheat so exported..." at a price of 25 cents per bushel.
>
> 7 CFR Par. 778.6 which requires Commodity Credit Corporation (CCC) to make "refund to the exporter or allow him a credit against the amount payable by him for certificates in such amount as CCC determines will make the United States wheat generally competitive in the world market, avoid disruption of world market prices and fulfill the international obligations of the United States."

The Issue

Whether the requirements for wheat export marketing certifi-

ates as provided in §§ 324 and 325 of the Food and Agriculture

Act of 1962 (76 Stat. 605, 626-631, 7 U.S.C. 1379d) and in §§ 202 and 203 of the Agricultural Act of 1964 (78 Stat. 173, 178-183) - amending the Agricultural Adjustment Act of 1938, as amended (7 U.S § 1281 et seq.) and the Agricultural Act of 1949, as amended (7 U.S § 1421 et seq.) - constituted[2/] a "Tax or Duty * * * laid on Articl exported from any State" in contravention of Art. I, § 9, clause 5 of the Constitution.

SUMMARY OF ARGUMENT

1. A tax or duty is a revenue producing measure exacted to co the expenses of government. The income from certificates sold to exporters is not used to defray the expenses of government but to finance the purchase of certificates from the producers, and is kep in a special fund in Treasury. Hence, the certificate charge is no a tax or duty within the intendment of the Constitution.

2. The Certificate charge is a valid exercise by Congress of power under the Commerce clause. The Wheat Allocation Program, of which the certificate charge to exporters is but one feature, is designed to stabilize wheat prices and farm income. It is a regu- latory measure, and the fact that some revenue may be produced as an incident to the regulation does not serve to classify the Act as a taxing statute.

2/ The statute has since been modified to eliminate the initial fixed price of 25 cents per certificate. Now the exporter pays to CCC or receives from CCC, determined on a daily basis, the amoun which will make American wheat competitive in the world market. 79 Stat. 1187, 1202-1206, 7 U.S.C. Supp. I §§ 1379b, 1379c, 1379d, 1379e, 1379g, 1379i, and 1445a. These statutory changes effectuate by the Food and Agriculture Act of 1965 relate primarily to the program for the 1966 marketing year and thereafter, and hence do not affect the pending case.

3. The certificate charge does not burden exports, but on he contrary is a benefit to the exporter since it serves to tabilize world prices, and is part of a program which guarantees he exporter a competitive position in the international market.

ARGUMENT

I. THE CHARGE OF 25 CENTS PER BUSHEL OF WHEAT EXPORTED IS NOT A "TAX" OR "DUTY".

Taxes and duties are compulsory exactions, revenue producing easures, collected and used for the general operations of govern- ent. United States v. LaFranca, 282 U.S. 568, 572 (1930), Lipke . Lederer, 259 U.S. 557, 561-562 (1921). As was stated in United tates v. Butler, 297 U.S. 1, 61 (1935): "A tax, in the general nderstanding of the term, and as used in the Constitution, signifies n exaction for the support of government. The word has never been hought to connote the expropriation of money from one group for the enefit of another."

In the instant action payments made by an exporter for the urpose of defraying subsidies to farmers cannot be properly termed tax or duty. On the contrary, here as in Rodgers v. United States, 32 U. S. 371, 374 (1947) the statutory plan[1/] is not a "revenue aising device," and "unlike a tax, it does not rest on the basic

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1/ In the Rodgers case the statute provided for cotton quotas, with enalties assessed against producers who marketed in excess of their uotas.

necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures."

Furthermore, in the instant case the money derived from the sale of the certificates did not go into a general fund to help defray the expenses of government, but went into a special fund in Treasury and was used to finance the purchase of certificates from the producers and for other CCC outlays.[4/]

It was held in the Head Money Cases, 112 U.S. 580, 595-596 (1884) that when a monetary exaction - imposed pursuant to the commerce clause - is deposited in a special fund in the Treasury to be used only in connection with the program enacted by Congress pursuant to the commerce clause, the payment thus required by the statute is not a tax or duty although "within a loose and more extended sense than was used in the Constitution" it may be called a tax.

Congressional Intent

Although Congressional intent concerning constitutionality of a statute is not conclusive it is entitled to judicial respect.

Here, there was little discussion by Congress concerning the

4/ Despite income from the sale of export certificates receipts CCC has operated at a net loss for many years, its last net realized gain occurring in 1949. (R. 54-55). The Commodity Credit Corporat is authorized by its charter to use in the conduct of its business all of its funds and other assets. 15 U. S. C. § 714f.

onstitutionality of the pending bill, in fact only two direct eferences. Congressman Thomas Curtis of Missouri stated:

> "Section 202(16) also authorizes the Secretary of Agriculture to require any person who wishes to export U.S. wheat to pay a tax to the U.S. Government at an amount which he determines. He estimates that amount at 25 cents per bushel. Our wheat exports could run as high as 800 million bushels. Using the Secretary's estimate, this empowers him to raise approximately $200 million worth of revenue. Article I, Section 9 of the Constitution of the United States states (inter alia): "No tax or duty shall be laid on articles exported from any State."
>
> In the past we have rarely had difficulty in understanding this clear prohibition against export taxes. Since we are now supposed to be having an all-out drive to expand U.S. exports, some may feel it is appropriate to test again the constitutionality of a tax levied on exports. Certainly I do not intend to debate the wisdom or constitutionality of this provision at this time, but again I suggest that the Ways and Means Committee should at least have the opportunity to review the proposal."
> Volume 110, Cong. Rec. Part 5, 88th Cong. 2nd Session, page 6132.

Congressman Carl Albert of Oklahoma, stated (110 Congressional Record, p. 7309, April 8, 1964):

> Finally, the distinction between provisions to "raise revenue" in the constitutional sense, and others has been well defined by the courts. The construction of this limitation -- article I, section 7 -- is practically well settled by the uniform action of Congress. According to that construction it "has been confined to bills to levy taxes in the strict sense of the word, and has not been held to extend to bills for other purposes which incidentally create revenue."
> Story on the Constitution (sec. 880, U.S. v. Norton, 91 U.S. 566, 569 (October 1875 term))

In all events it is evident that Congress did not consider the legislation to be a tax measure. That part of the Act relating to the wheat certificate program originated in the Senate, not the House, as would be required for revenue measures. It was handled in the House by the Agricultural Committee not the Ways and Means Committee, as would have been the case had the bill been a revenue measure; and likewise in the Senate the bill was handled by the Agricultural and Forestry Committee rather than by the Finance Committee.

Throughout the discussion[5/] the emphasis was on international commitments rather than on revenue. Price support through loans in the previous year had been pegged at $1.82. Price support in the 1964 marketing year through loans was to be $1.30. (R 46). If world prices remained above $1.30, and export certificates were not required, the exporters would get a real windfall, and possibly disrupt the world market.[6/] The export certificate was the Congressional answer.

5/ See 110 Cong. Rec. 3985, 4104, 4105, 4140, 4343, 4345, 4476, and Hearings before the Committee on Agriculture, House of Rep., 87th Cong. 2nd Sess. on H.R. 10010, Serial AA, Part 1, pp. 171-172, Hearings before the Subcommittee on Wheat of the Committee on Agriculture, House of Rep., 88th Cong. 2nd Sess., Serial HH, Part 2, pp. 207-208, Hearings before Senate Committee on Agriculture and Forestry, 88th Cong. 2nd Sess. on S. 1581, 1617, 2258, 2357, 2492, pp. 32, 38, 41, 171-172.

6/ A return of the certificate payments to exporters would result in a windfall since the cost has naturally been passed on to the foreign buyers.

The Committee on Agriculture and Forestry reported as follows:

> * * * the purpose of requiring certificates on wheat and wheat products exported is not to obtain revenue, but solely to regulate the price at which such products are exported and eliminate the possibility of windfall profits * * *." Sen. Report No. 874, 88th Cong., 2nd Sess., p. 33.

A Case in Point

In Morrison Milling Co., et al. v. Freeman, No. 19794 and National Biscuit Co., et al. v. United States, No. 19795, in the United States Court of Appeals, District of Columbia, wheat processors attacked regulations (under the same Wheat Allocation Program) which required them to pay 70 cents per bushel of wheat, it being plaintiffs' contention that the statute only required them to pay for that portion of the wheat which became flour (about 72%). They argued that the Act was a revenue measure and should be strictly construed against the government. In rejecting that argument, the Court of Appeals said in its opinion filed on July 18, 1966, that "the purpose of the statute appears to be to regulate the price of wheat for the benefit of the grower, and the federal power relied upon is the Commerce Clause." Slip opinion, p. 8, fn. 3. "The bill was not handled in either chamber [of Congress] as a tax; and the revenue raised is for the achievement of a regulatory purpose and not to contribute to the general funds of the Treasury." Ibid.

From the foregoing discussion it seems reasonably clear that the sale of export certificates to exporters did not in any constitutional sense impose a tax or duty, since the statute in question

did not purport to be a revenue measure, and since in the final analysis the exact amount of the payment depended not on Congress but on international wheat prices.

II. THE CERTIFICATES HERE INVOLVED WERE A PROPER EXERCISE OF THE CONGRESSIONAL POWER TO REGULATE COMMERCE.

The Constitution grants to Congress the power to regulate interstate and foreign commerce. Art. 1, Sec. 8, Clause 3. In determining whether a statute is covered by the taxing or commerce clauses of the Constitution the basic factor is the Congressional objective.[7/] In Rodgers v. United States, 138 F. 2d 992, C.A. 6 (1943) a statute imposing a penalty of 3 cents a pound on excess cotton was attacked, and the Court in upholding the statute said, p. 994:

> "The test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the Congressional enactment."

7/ The wisdom of Federal regulation, the need for the regulation, and the effectiveness of the regulation are questions for Congress not the courts. Northern Securities Co. v. United States, 193 U.S. 197, 350 (1903); Arizona v. California, 283 U.S. 423, 455-457 (193 American Power Co. v. Securities and Exchange Comm'n., 329 U.S. 90 106-107 (1942); Secretary of Agriculture v. Central Roig Co., 338 U.S. 604, 606, fn. 1 (1949).

Whether a statute is regulatory in nature or intended to raise evenue is not to be determined by isolating and construing one rticular provision. Its purpose is to be ascertained by examination of the entire statute and the occasion and circumstances f its use. Helvering v. Stockholms etc. Bank, 293 U. S. 84, 93- (1934). "The language of an act is, of course, the fundamental uide to legislative meaning and purpose, but it is the language of e act as a whole that is to be read and not the words of a section provision in isolation * * *." Elizabeth Arden Sales Corp. v. s Blass Co., 150 F. 2d 988, 992-993, C.A. 8 (1945), certiorari nied, 326 U. S. 773. Also see: Richards v. United States, 369 S. 1, 11 (1961); Labor Board v. Lion Oil Co., 352 U. S. 282, 288 956); Mastro Plastics Corp. v. Labor Board, 350 U.S. 270, 285 (1955).

And Congress in exercising its power to regulate interstate foreign commerce may impose economic burdens and regulate prices. oves v. Slaughter, 15 Pet. 449, 505 (1841); Wickard v. Filburn, 7 U.S. 111 (1942). Also see United States v. Rock Royal Corp., 7 U.S. 533, 569-571 (1938); Sunshine Anthracite Coal Co. Adkins, 310 U.S. 381 (1940), the Head Money Cases, supra. United ates v. Stangland, 242 Fed. 2d 843, 848, C.A. 7 (1957). For the ower of Congress under the commerce clause "is as broad as the conomic needs of the Nation." American Power Co. v. Securities and change Com., 329 U.S. 90, 103-104.

Whenever the statutory purpose to regulate commerce "permeates e entire congressional plan," the imposition of a tariff or duty

is a valid incident to the regulation of commerce. Board of Trust v. United States, 289 U.S. 48, 58-49 (1932). "Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects. Its requir ments are not the less regulatory [under the commerce clause] because they are not prohibitory or retaliatory. They embody the congressional conception of the extent to which regulation should go. But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it [pursuant to the commerce clause of the Constitution], the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independe exercise of the taxing power." Id. at 58.

Conversely, Congress in the exercise of its taxing power may as an incident thereof bring about a regulatory effect. Sonzinsky v. United States, 300 U.S. 506 (1936).

To completely understand the purpose and effect of the statut challenged in these proceedings, a few words concerning its historical background will be useful.

The Wheat Marketing Allocation Program is a part of the Agricultural Adjustment Act of 1938, as amended (7 U. S. C. §§ 128 1379a-1379j), and the Congressional findings and statutory provisi with respect to the Wheat Marketing Allocation Program are underscored by the Congressional findings in 1938 with respect to wheat

s follows: "Wheat * * * is produced throughout the United States y more than a million farmers, is sold on the country-wide market nd, as wheat or flour, flows almost entirely through instru-entalities of interstate and foreign commerce from producers to onsumers. Abnormally excessive and abnormally deficient supplies f wheat on the country-wide market acutely and directly affect, urden, and obstruct interstate and foreign commerce. Abnormally xcessive supplies * * * depress the price of wheat in interstate nd foreign commerce, and otherwise disrupt the orderly marketing f such commodity in such commerce. Abnormally deficient supplies esult in an inadequate flow of wheat and its products in interstate nd foreign commerce * * * and with excessive increases in the rices of wheat and its products in interstate and foreign commerce. . . . The conditions affecting the production and marketing of heat are such that, without Federal assistance, farmers, individ-ally or in cooperation, cannot effectively prevent the recurrence f such surpluses and shortages and the burdens on interstate and oreign commerce resulting therefrom, maintain normal supplies of heat, or provide for the orderly marketing thereof in interstate nd foreign commerce." 7 U. S. C. § 1331.

There are additional tokens of Congressional purpose within he statute and outside of it. As noted p. 2 infra, in 1962 ongress enacted further amendments to the Agricultural Act of 938 which stated, in part, "Wheat.... is one of the great export rops of American agriculture and its production for domestic

consumption and for export is necessary to the maintenance of a sound national economy and to the general welfare. ....It is necess in order to assist wheat producers in obtaining fair prices, to regulate the price of wheat for domestic food and for exports in the manner provided in this subtitle." 7 U. S. C. 1379a. (Emphas supplied.) Furthermore the Wheat Marketing Allocation Program - enacted by Congress with regard, inter alia, to our international obligations (78 Stat. at 181, 7 U. S. C. § 1379d(b)) - is to be interpreted so as to be consonant with the multilateral Internatio Wheat Agreement, 1962, the objectives of which are:

> "(a) To assure supplies of wheat and wheat-flour to importing countries and markets for wheat and wheat-flour to exporting countries at equitable and stable prices;
>
> "(b) To promote the expansion of the international trade in wheat and wheat-flour and to secure the freest possible flow of this trade in the interests of both exporting and importing countries, and thus contribute to the development of countries, the economies of which depend on commercial sales of wheat;
>
> "(c) To overcome the serious hardship caused to producers and consumers by burdensome surpluses and critical shortages of wheat;
>
> "(d) To encourage the use and consumption of wheat and wheat-flour generally, and in particular in developing countries, so as to improve health and nutrition in those countries and thus to assist in their development; and
>
> "(e) In general to further international cooperation in connexion with world wheat problems, recognizing the relationship of the trade in wheat to the economic stability of markets for other agricultural products." 13 United States Treaties and Other International Agreements, p. 1572.

The President, in submitting the International Wheat Agreement o the United States Senate, transmitted to the Senate the report f the Secretary of State regarding the International Wheat greement, and it is there stated:

> "The principal benefit of the agreement to the United States is the price range, internationally accepted as reasonable, notwithstanding the present imbalance of world supply and effective demand. It undergirds the national policy of withholding excess stocks from the export market, rather than dumping them with disastrous effects upon world and domestic prices. Operations under the agreement also provide a useful framework within which to conduct the U.S. export payment programs on wheat and flour which are necessitated by domestic price levels." Sen. Executive D., 87th Cong., 2d Sess., p. 4.

The question then, is whether the statute requiring the urchase of export certificates was, indeed, a regulatory measure esigned to benefit commerce and to protect the domestic economy, r was it, in reality, a taxing statute in the guise of a regulation. or, as held in Wickard v. Filburn, supra "the stimulation of com- erce is a use of the regulatory function [under the commerce lause of the Constitution] quite as definitely as prohibitions r restrictions thereon." 317 U.S. at 128.

The Wheat Allocation Program in non-technical language has een described by Mr. Godfrey. (R. 41-47). Reduced to its ssentials, the program provided:

a. For voluntary limitation of production, and adoption of specified conservation practices.

b. Price supports for those complying with the program, through CCC loans.

c. Subsidies through issuance of wheat certificates valued at 70 cents for wheat consumed for food in the United States and 25 cents per bushel of a certain portion of wheat to be exported.

d. Financing of the above subsidies through sale of certificates to processors and exporters - based on a rate of 70 cents per bushel of wheat used for food, and 25 cents per each bushel of wheat exported.

e. A payment to exporters of whatever sum is needed to make American wheat competitive in the world market.

The Wheat Allocation Program then had several apparent objectives:

a. To stabilize the farmer's income.

b. To prevent windfall profits to exporters, but at the same time to guarantee their ability to meet foreign competition on the world market.

c. To assist the stabilization of the world wheat prices.

d. To avoid burdening the American taxpayer with the costs of the program.

Such a program, with such objectives, certainly cannot be termed anything but regulatory. None of the features of a taxing statute is present. Taxes are levied to produce income to meet fixed expenses. A taxing program to be effective must produce income, and the amount of that income must be subject to fairly accurate computation. Here, the program may or may not have resulted in producing revenues. The exporters, although paying 25 cents per bushel, may have received refunds and subsidies totalling in excess of 25 cents. Rather than produce income the

rogram may have produced a deficit.[8/]

So much for the economics of the program. Now let us turn to udicial rulings bearing upon regulatory statutes comparable to hat involved here.

In Wickard v. Filburn, supra, the Agricultural Adjustment Act f 1938, which controlled the production of wheat, and provided or penalties on production of excess wheat, was attacked on the round that it violated the commerce clause and the due process lause of the Fifth Amendment. The contention was made that Congress as invading matters purely local in character.

"The wheat industry," the Supreme Court noted, "has been a roblem industry for some years." (P. 125.) "In the absence of egulation, the price of wheat in the United States would be much ffected by world conditions." (P. 126.) "Many countries, both mporting and exporting, have sought to modify the impact of the orld market conditions on their own economy. Importing countries ave taken measures to stimulate production and self-sufficiency. he four large exporting countries * * * have all undertaken

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/ During the fiscal year ending June 30, 1965, the Commodity Credit orporation received from the wheat certificate operations (both omestic and export) net proceeds of $106,652,864. But this was ore than offset by export subsidy payments and the value of arketing certificates reflected in the price Commodity Credit orporation paid for wheat products. Hearings before Subcommittee f the House Committee on Appropriations on the Department of griculture Appropriations for 1967, 89th Cong., part 3, p. 295.

various programs for the relief of growers. Such measures have been designed, in part at least, to protect the domestic price received by producers." (PP. 125-126.)

The Court then upheld the Act as a valid exercise of the plenary power of Congress to regulate commerce. The Wheat Marketing Allocation Program in the case sub judice is also authorized by certain provisions of the Agricultural Adjustment Act of 1938, as amended. To be sure, the provisions for the Whea Marketing Allocation Program had not been enacted by Congress at the time of the decision in Wickard v. Filburn, supra. But th statutory measure in its totality both then and now is plainly a regulation of commerce.

Likewise, a monetary penalty imposed by Congress on the marketing of excess cotton under the Agricultural Adjustment Act of 1938, as amended, has been held not to violate Art. I, § 9, clause 5, of the Constitution even though the cotton was for exportation. United States v. West Texas Cottonoil Co., 155 F. 2 463, 465-466, C.A. 5 (1946). The Court noted that the monetary penalty "has for its object not the prevention or burdening of exportation, but the prevention of raising for market, and market cotton in excess of the allotment." Id. at 465. To be sure, the imposition of the monetary penalty is a type of economic burden under the regulatory program, but there is no impingement on Art. § 9, clause 5, of the Constitution. Id. at 465-466.

In the case of Pace v. Burgess, 92 U.S. 372 (1875) and Turpin v. Burgess, 117 U.S. 504 (1886) a congressional enactment established an excise tax of 32 cents per pound on all manufactured tobacco, except smoking tobacco, which was taxed at the rate of 16 cents per pound. For tobacco to be exported a stamp costing 25 cents had to be affixed to each package. The price of the export stamp was later reduced to 10 cents. Some years later, Congress enacted a statute removing the "export tax" on tobacco.

The plaintiffs challenged the stamp as an export tax in violation of the Export Clause of the Constitution. The Court concluded that the monetary charge was not a tax or duty but a regulatory measure to "facilitate the disposal of tobacco intended for exportation" (92 U. S. at 374) and a "means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked" (92 U. S. at 375). The Court said that the charge "may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. * * * In the case under consideration, having due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional preovisions referred to." 92 U. S. at 375-376. Also see: Rodgers v. United States, supra; Mulford v. Smith, 307 U. S. 38 (1939); Armour Packing Co. v. United States, 209 U.S. 56 (1907), Cornell v. Coyne, 192 U.S. 418 (1903).

The appellant here appears to contend that the power to regulate foreign commerce has been whittled away by the Export Clause - that is that Congress cannot, in the exercise of its power under the commerce clause, take any regulatory action which as a concomitant, imposes a levy upon exports. In other words, as we understand appellant's position, insofar as foreign commerc is concerned the question is not whether the statute is regulator or for revenue purposes but whether the statute, regardless of statutory purpose, imposes a burden on exports. If it does it violates the Constitution.

The cases cited by appellants do not support this propositio

Four of the five cases relied on are specific revenue measur

In Fairbanks v. United States, 181 U. S. 283 (1900) a federa tax on bills of lading covering wheat exports under the War Reven Act of 1898 was held invalid by a five to four decision.

In United States v. Hvoslef, 237 U. S. 1 (1914) stamp taxes charter parties for carriage of cargo to foreign ports under the War Revenue Act of 1898 was declared in violation of the Export Clause.

In Thames and Mersey Insurance Co. v. United States, 237 U. 19 (1914) stamp taxes under the War Revenue Act of 1898 and cover insurance policies on exports was held invalid.

In A. G. Spalding Co. v. United States, 262 U. S. 66 (1922) tax on baseball equipment to be exported, under the War Revenue A of 1917 was ruled invalid.

The case of Brown v. Maryland, 12 Wheat. 419 (1827) involved a state statute requiring importers to take out a $50 license fee. The Court ruled that taxation of imports was the exclusive province of the Congress.

Thus the authorities relied on do not support the appellant's theory that the Export Clause has limited Congress in its exercise of the Commerce power.

Of far greater significance are the cases dealing with Article I, Section 10, Clause 2 of the Constitution which provides that: "No state, shall without the consent of the Congress, lay any Import or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws..." The similarity in language between the two export clauses has been noted, and in Turpin v. Burgess, supra, the Court stated that the "constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State." (117 U. S. at 506-507). It has also been held that the word "export" has the same meaning under the two clauses. Empressa Siderurgica v. Merced Co., 337 U. S. 154, 156, fn. 2 (1948). And it is well settled that a State may require a monetary payment as part of a regulatory program even though the charge or fee relates to imports or exports. In Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, 310, 313 (1851) the court upheld the propriety of a State law requiring vessels which refused to take a pilot to pay one-half the regular amount payable for pilotage. It held that the

measure was designed to regulate navigation and was not in the nature of a tax in violation of the Constitutional prohibition. Also see: Clyde Mallory Lines v. Alabama, 296 U.S. 261, 263-268 (1935); Polar Co. v. Andrews, 375 U.S. 361, 371, 374, 381-383 (1963).

It is submitted that the wheat allocation program is in every sense a regulatory program, with its ultimate goal the stabilization of prices and income, and that whatever revenue may result is insignificant and incidental. The statute, then, is a valid exercise of the commerce clause, and constitutional.

III. THE EXPORT CERTIFICATES DID NOT BURDEN EXPORTS.

Appellant's chief reliance appears to be founded on the history of the Export Clause at the Constitutional Convention as reported by Farrand. An attempt to piece together at this late date the various social, political and economic motives which led to the rejection of certain proposed amendments, or to the location of the Export Clause outside both the Taxing and the Commerce Clauses does not lead to any conclusive results.[9/]

However, from the various commentaries it must be conceded that certain members of the Convention were concerned with the placement of burdens upon southern exports. And for the sake of argument, let us assume that the Constitution forbad the Congress to burden exports with taxes, duties or otherwise (and this is the most favorable interpretation appellant could hope for) could appellant establish here that the Wheat Allocation Program did, in fact, burden exports? We submit that quite the reverse is true. The object of the program, as stated in the statute, is to "make the United States wheat and

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9/ In Pace v. Burgess, supra, the plaintiff in error made the same argument advanced by the appellant in this case, to-wit, that since a proposal at the Convention to insert after the word "duty" the words "for the purpose of revenue" was rejected by a vote of eight states to three it was evident that the framers of the Constitution had rejected the idea that a tax or duty could be employed to regulate trade. (p. 372). The Supreme Court did not deem the argument of sufficient weight to justify any mention. For additional discussion of the Constitutional history, see 1 Story, Constitution of the United States (5th Edit., 1891) at pages 661-762, and 2 Story at pp. 2-44.

wheat flour generally competitive in the world market, avoid disruption of world market prices, and fulfill the international obligations of the United States." 78 Stat. at 181, 7 U.S.C. § 1379(b). And certainly the charge for an export certificate in this case did not prevent the exportation of the wheat or impose a burden upon the exporter. The net charge for the export certificate (face value less the refund) reflected the amount by which the world price exceeded the domestic price. There was, therefore, no charge for export certificates, except where world prices were high than domestic prices. In July 1964, for example, the average U. S. market price for #1 Hard Winter wheat f.o.b. Gulf was $1.72; the cost of such wheat to an exporter including the cost of certificate therefore, totaled $1.97; the export price at which U. S. wheat would be competitive in the international market was determined to be $1.87. Accordingly, the certificate refund for #1 Hard Winter wheat exported from the Gulf during July was $.10, i.e., $1.97 less $1.87. The charge of $.25 per bushel for export certificates, whil thus more than enough to cover the difference between domestic prices and world prices in some cases, is necessary in order that it will always be enough to cover the difference in any transaction regardless of a discount, or difference in qualities or grades involved, or the time of the year when the sale is made. By this flat charge-and-variable refund device, the exporter is able to compete on the international market without disruption of world market prices. He is also able to pass on to the buyer that part

f the cost of the certificates for which he had not obtained a efund from the Commodity Credit Corporation.

The exporter not only received a full refund of the cost of ertificates, in many instances, but was paid, in addition, a ubsidy in order to make his wheat competitive. Thus, in the case f #1 Dark Northern Spring wheat in April 1965, the U. S. market rice at Duluth including the cost of certificates was $1.98; the xport price necessary to make U. S. wheat competitive was $1.60. herefore, for shipments from Duluth in this month the exporter eceived a full refund of the $.25 certificate and in addition a ubsidy of $.13 ($1.98 less $1.60). (R. 48-49).

Rather than act as a deterrent to exports it seems evident hat the program encouraged exports since it removed much of the ncertainty with respect to world market prices. The exporter when ontracting to sell wheat to foreign customers had the advantage of nowing that regardless of daily fluctuations his costs would be ow enough to enable him to meet foreign competition. Under such onditions, what is the burden on exports? Appellees submit that here was none.

Congressman Purcell, Chairman of the Wheat Subcommittee of the ouse Agriculture Committee, confirmed the value of the certificate rogram to the exporter.

> Recall the national average loan rate would have been $1.26 instead of the $1.30 a bushel provided under the 1964 voluntary certificate plan. The 1964 wheat crop would have exceeded the 1,290 million bushels now in prospect. Additional production coupled with a lower

market price support level undoubtedly would have resulted in a lower season average price than will obtain.

Wheat from the United States would have been available to importing countries at a market price reflecting this lower loan rate and excess supply position. Other wheat exporting countries would have been forced to lower the price of wheat to meet this competition. In view of current world wheat prospects for the 1964-65 marketing year, the lower world price probably would not have resulted in an increase in sales. The current wheat program, authorizing export certificates, has prevented this potential loss to all exporting countries from becoming a reality.

Therefore, it seems clear that the 1964 wheat program contributes to a higher world price and because of this, returns from exports will be higher than they would have been in the absence of legislation.

Export certificates, authorized by the Agricultural Act of 1964, simultaneously help improve farm income and insure continued world wheat price stability at a higher level than would be the case without the act. The difference between the cost of wheat to the exporter - including the export certificates - and the price necessary to keep U. S. wheat competitive in world markets is refunded to the exporter. A higher world price simply means a lower subsidy payment. 110 Cong. Rec. 23807.

IV. THE PRESUMPTION OF THE CONSTITUTIONALITY OF THE ACT HAS NOT BEEN OVERCOME.

"The presumption is in favor of every legislative act, and the whole burden of proof lies on him who denies the constitutionality Brown v. Maryland, 12 Wheat. (25 U.S.) 419, 436 (1827). As Chief Justice Marshall also stated in McCulloch v. Maryland, 4 Wheat. (1 U.S. 316, 420 (1819):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are

not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

While the literal language used by the framers of the Constitu-ion cannot be disregarded, of greater significance is the evolving onstitutional philosophy. As also stated by Chief Justice Marshall : pages 413-414:

> This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.
>
> If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

In this connection, it should be remembered that the men rafting the Constitution were determined to write a document which ould be flexible enough to accommodate the changing times and

circumstances. Today the times and circumstances are different. We are not concerned with real or fancied northern oppression of southern agriculture. We are concerned with the need for controlled production. We are concerned with the need for a stable world price for one of our major exports. We are concerned with the necessity of maintaining and stabilizing farm income. The Wheat Allocation Program was intended to resolve, to some extent at least, these problems, and the statute in question should not be declared unconstitutional in the absence of compelli proof of its violation of a constitutional mandate. In the langua of Justice Harlan in the case of Northern Securities Co. v. United States, supra (193 U.S. at 350): "...no higher duty rests upon thi court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless su statute be plainly and unmistakably in violation of the Constituti

Surely, the Wheat Allocation Program, and its requirement of marketing certificates, was not "plainly and unmistakably in viola of the Constitution."

CONCLUSION

The export certificates were neither a tax nor a duty in the constitutional sense, but were part of a regulatory scheme designe to enable the United States to honor its international commitment, to help stabilize world wheat prices, to assure American exporters a competitive position in the world market, and to assist in the stabilization of farm income. Rather than place a burden on

porters the plan as a whole was an obvious benefit to exporters.

e judgment of the district court should be affirmed.

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CERTIFICATE

I certify that, in connection with the preparation of this ief, I have examined Rules 18 and 19 of the United States Court Appeals for the Ninth Circuit, and that, in my opinion, the regoing brief is in full compliance with those rules.

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